IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-804

GEORGE R. CAESAR, M.D., *Petitioner,*

v.

LOUIS P. MOUNTANOS, as Sheriff of the County of Marin, State of California, *et al., Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE GRANT OF CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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INTEREST OF AMICUS CURIAE

The American Psychiatric Association, founded in 1844, is the nation's oldest national medical society and largest professional organization of psychiatrists and psychotherapists. Its over 22,000 members comprise about 80 percent of all physicians who practice psy-

chiatry and specialize in the treatment of mental illness and emotional and psychological problems. The Association has a strong commitment to the care and treatment of persons who need psychiatric and psychotherapeutic care. In this regard, the Association believes that establishing an atmosphere in which such persons will be encouraged to seek needed assistance requires strict assurance of professional confidentiality. Moreover, the Association further believes that vigilant protection of confidentiality between the psychiatrist and his patient is absolutely essential to the success of psychotherapy as a course of treatment.

As the Court of Appeals for the Ninth Circuit recognized in the instant case, "psychotherapy is perhaps more dependent on absolute confidentiality than other medical disciplines." Psychotherapy probes the innermost reaches of the patient's personality and experience. During treatment the patient often is required to lay bare his most intimate and embarrassing thoughts, dreams, emotions and fantasies. These revelations typically include material that belongs to the patient's irrational and primitive self, which he has quite appropriately declined to share even with his closest loved ones. Indeed, some of these innermost thoughts may be so painful, embarrassing or shameful to the patient himself that he has repressed them—*i.e.*, removed them from his own conscious memory and stored them in his unconscious. In the therapeutic process this intimate and painful material is brought to consciousness and articulated only because it is necessary for treatment. If, however, such material were disclosed to family, colleagues, friends or the public, the results could be devastating. Thus, the possibility that the therapist might be compelled, even

in a courtroom, to reveal this kind of information about a patient to others can both serve as a strong deterrent to persons seeking needed treatment, and destroy treatment already in progress.

This case involves a California statute that poses a serious and continuing threat to meaningful psychotherapist-patient confidentiality. The Court of Appeals acknowledged here, as have the California courts, that the patient's interest in preserving the confidentiality of communications with his therapist during treatment is a constitutionally-protected one, falling squarely within the zone of personal privacy recognized by the leading decisions of this Court. By a 2-1 vote, however, the Court of Appeals held that the statute, as interpreted by the California courts, does not effect an unconstitutional intrusion on that right.

Amicus believes that the limiting construction placed on the statute by the California Supreme Court and relied upon heavily by the Court of Appeals below in sustaining its constitutionality is illusory. In practice, as this case itself demontrates, the limitations read into the statute by the California Supreme Court in an attempt to salvage its constitutionality have been impossible to apply and have failed to prevent significant disclosure by psychotherapists of their patients' intimate confidential communications.

Because this case presents a question of the extent to which an important and admittedly constitutionally-protected interest can be invaded by state regulation, and because the interest involved—psychotherapist-patient confidentiality—is central to the encouragement and success of psychiatric treatment, *amicus* believes that this is an appropriate case for review by this Court.

CONSENT OF THE PARTIES

Amicus is filing this Brief with the consent of both parties, whose letters of consent have been filed with the Clerk of this Court.

STATEMENT OF THE CASE

Petitioner, Dr. George R. Caesar, is a physician licensed in California, who for many years has been engaged in the private practice of psychiatry in Marin County, California.

In December 1969, Ms. Joan Seebach was referred to Dr. Caesar for psychiatric examination and treatment following an automobile accident in which she had been involved on December 4, 1969. The referral was made by other attending physicians because of the difficulty they had encountered in finding physical symptoms for Ms. Seebach's complaints. During the subsequent course of treatment, Dr. Caesar saw Ms. Seebach about twenty times for psychotherapy. According to the testimony of another psychiatrist, Dr. Caesar's treatment of Ms. Seebach concerned her "early childhood problems" and "went back into her history to see if she had some unresolved problems from earlier stages of her life with which [Dr. Caesar] could help her in dealing with the present."

In July and August 1970, Ms. Seebach filed personal injury actions in the Superior Court of the State of California for Marin County to recover damages for two successive automobile accidents, the one in December 1969 and an earlier accident in which she also had been involved.[1] In her complaints, Ms. Seebach alleged

[1] The two actions were subsequently consolidated.

that the accidents had caused her personal injury and pain and suffering, including mental and emotional distress.

In April 1972, attorneys for the defendants in these two actions took the deposition of Dr. Caesar, who, at that time, was no longer treating Ms. Seebach. Counsel sought to question Dr. Caesar about communications and information he had received from his patient. Dr. Caesar refused to answer these questions for the following reasons:

> "A. In my judgment, answering further questions and revealing her confidences could be harmful to her psychologically and detrimental to her future well-being.
>
> B. I do not feel I have received a valid consent from her to testify.
>
> C. The answers to questions asked me might not be relevant to this lawsuit and would, therefore, be unnecessary and unwarranted breaches of confidence."

Dr. Caesar's reluctance to divulge Ms. Seebach's confidential communications prompted her attorney to send her to another psychiatrist, Dr. Portia Bell Hume, "for evaluation for trial purposes, so that we would avoid this problem of having the treating psychiatrist be the one who is going to be in trial. . . ." Counsel also offered to make Ms. Seebach available to the defendants for diagnostic examination by a psychiatrist of their own choosing.

Dr. Hume's deposition was taken, and she testified fully concerning her examination and diagnosis of Ms. Seebach. According to Dr. Hume, Ms. Seebach appeared "genuinely mildly depressed as a reaction to

the kinds of changes that have occurred in her life as a result of her disabilities." Dr. Hume further stated that Ms. Seebach did not require any "specifically psychiatric treatment" for this depression; rather, the condition could be handled by "just human support" from her family, friends and colleagues.

Meanwhile, proceedings were brought in the Marin County Superior Court to compel Dr. Caesar to answer the questions proffered to him at his deposition, based on the provisions of California Evidence Code §§ 1014-1016. Under Section 1014, a psychotherapeutic patient has the privilege to refuse to disclose and to prevent others from disclosing confidential communications between the patient and doctor; Section 1015 permits the psychotherapist to claim this privilege on behalf of the patient. But Section 1016, in relevant part, provides:

> "There is no privilege under this article as to communications relevant to an issue concerning the mental or emotional condition of the patient if such an issue has been tendered by: (a) The patient . . . ."

Following a lengthy hearing, directed primarily to the validity of Section 1016, the court entered an order upholding the statute and its application to Dr. Caesar, and compelling his response to the deposition questions.

Ms. Seebach subsequently filed a formal notice stating that she did not waive her privilege with respect to communications with Dr. Caesar. She further indicated that she was limiting her "psychiatric claims to those described by Dr. Hume in her deposition." Nonetheless, the interrogation of Dr. Caesar, who appeared at the deposition pursuant to court order, continued.

Attempting to comply insofar as possible with the Superior Court's order, Dr. Caesar answered many of the questions concerning his treatment of Ms. Seebach. For example, Dr. Caesar testified that he had treated Ms. Seebach for injuries she had sustained in the accidents and that he had originally diagnosed her as suffering from moderate to severe depression. Dr. Caesar refused, however, to answer eleven further questions, on constitutional grounds and on the ground that to answer "would violate the ethics of my profession, * * * the Hippocratic oath and what has been called the first principle of medicine, *primum non nocere* which literally translated means first no harm."

At a subsequent hearing concerning Dr. Caesar's refusal to answer, he explained that he had voluntarily answered questions where he felt that the harm involved was no greater than simply the breaking of the confidence, but that he had refused to supply answers that would "be so harmful [to Ms. Seebach] as to constitute a serious breach of the ethics of my profession." Dr. Caesar also stated:

> "This patient consulted me of her own free will, at her attending physician's advice. She confided in me, which allowed me to make professional judgments about her. *It was implicitly understood, as it is with each psychotherapeutic patient, that everything she discussed with me, and my professional judgments about her, would be held in strict confidence.* The patient's purpose in consulting me was to seek help for her distress. *The question of litigation, or evaluation for this purpose, was never discussed or considered.* To

break the confidence of this patient in a manner harmful to her would be a violation of the trust she placed in me, and I must refuse to do so, because to do so, in my opinion, constitutes unethical practice.

* * *

"*Unlike other physicians . . . the relationship between the patient and the* [*psychotherapist*] *cannot be separated from the treatment itself. It is an integral part of that treatment.* If a neurosurgeon must report his objective findings in a case, if this goes against his patient's interest, his relationship with the patient may suffer, but the physical treatment given the patient will not be affected. But if a psychiatrist does the same thing, the treatment will be damaged or destroyed because the patient's trust in his doctor is an integral part of the therapeutic effect of the relationship on the patient." (Emphasis supplied.)

After this hearing, a contempt order was issued on December 12, 1972, and Dr. Caesar was committed to the custody of the County Sheriff. This commitment was stayed, however, pending review by the state and federal courts.

Thereafter, a writ of certiorari was denied by the California Court of Appeals, and a hearing was denied by the Supreme Court of California. Petitioner thereupon filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, which was also denied. On appeal, the Court of Appeals for the Ninth Circuit affirmed, Judge Hufstedler dissenting in part.

ARGUMENT

I. COMPELLED DISCLOSURE OF CONFIDENTIAL COMMUNICATIONS BETWEEN A PATIENT AND HIS TREATING PSYCHOTHERAPIST UNDER THE CALIFORNIA EVIDENCE CODE VIOLATES THE CONSTITUTIONAL RIGHT OF PERSONAL PRIVACY.

A. The Right to Privacy of Psychotherapeutic Communications Is a Fundamental Constitutional Right.

1. Strict Confidentiality Is Essential to the Therapeutic Process.

By its nature, psychotherapy requires a patient to disclose his most intimate emotions, fears and fantasies. People usually enter psychotherapy because they have deep-seated conflicts and impairment of functioning which limit their ability to work effectively and to enjoy fully satisfying relationships with other people. To alleviate these blocks and conflicts, the therapist asks the patient to abandon "rational thought" and to express thoughts and fears that may never have been revealed to anyone else. In this manner, the roots of the conflict begin to surface. According to Freud, "[i]f a hysterical, phobic or obsessional idea can be traced back to the elements in a patient's mental life from which it originated, it simultaneously crumbles away and the patient is freed from it." Freud, "The Interpretation of Dreams," in 4 *Standard Edition of the Complete Psychological Works of Sigmund Freud* 100-101 (1958).

Often, these innermost thoughts are so painful, embarrassing or shameful that the patient has never before allowed himself to acknowledge them. In the therapeutic process, therefore, the patient typically is

required to pull out of his unconscious and bring into his conscious memory

> "... feelings and attitudes which are unacceptable *to the patient* ... [as well as] attitudes considered asocial or anti-social by the community. The unconscious is a storehouse of a lifetime's sinful wishes (and every man in varying degrees is a combination of Dr. Jekyl and Mr. Hyde)." Slovenko, *Psychotherapy, Confidentiality and Privileged Communications* 47 (1966) (emphasis supplied).

While disclosure of this material to the therapist is necessary for effective treatment, its dissemination to a patient's friends or loved ones may destroy their trust and love. Moreover, public disclosure of such private information is likely to cripple the patient's ability to function in society.

Failure to guarantee and enforce strict protection for the confidentiality of psychotherapeutic treatment disclosures will have two pernicious effects. First, it will deter patients who are in need of treatment from seeking it out in the first place, or from being sufficiently candid to allow for effective treatment. Second, disclosure will have a devastating effect on the course of treatment in progress for any patient whose therapist is compelled to make public his most intimate revelations. See, *e.g.*, Katz, Goldstein & Dershowitz, *Psychotherapy, Psychoanalysis and the Law* 726-27 (1967).

The courts increasingly have recognized the unique and critical role that confidentiality plays in psychotherapeutic treatment. The California Supreme Court itself has taken note of the "growing consensus throughout the country, reflected in a trend of legislative enactments, ... that an environment of confidentiality of treatment is vitally important to the successful operation of psychotherapy." *In re Lifschutz,* 467 P.2d 557, 560-61 (1970). And the court below in the instant case acknowledged that "psychotherapy is perhaps more dependent on absolute confidentiality than other medical disciplines." (Slip. Op. at 7.)

One of the reasons for this is the key element played in successful psychotherapy by the therapist's ability to create and maintain the patient's trust. As the late Judge Edgerton, quoting in part from Guttmacher & Weihofen, *Psychiatry and the Law* 272 (1952), stated in *Taylor* v. *United States,* 222 F.2d 398, 401 (D.C. Cir. 1955):

> "Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him. 'The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. ... It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—must be revealed to the whole world from a witness stand.' "

In short, as Dr. Caesar himself testified in this case, the confidential private relationship between the psychotherapist and his patient "cannot be separated from the treatment itself. It is an integral part of that treatment."

2. The Confidentiality of Psychotherapeutic Communications Is Protected by the Constitutional Right to Privacy, Which Is a "Fundamental" Constitutional Right.

This Court has held that "a right of personal privacy, or a guarantee of certain areas or zones of privacy does exist under the Constitution," and protects intimate personal activities and relationships touching upon the right to conception and abortion, marriage, procreation and other sexual activities, family relationships, child-rearing and education, and motherhood. *Roe* v. *Wade*, 410 U.S. 113, 153 (1973), and cases cited therein. Communications between a psychotherapist and patient in the course of treatment commonly involve the most intimate medical and psychological problems involving those very relationships of family, marriage, motherhood and fatherhood, and human sexuality.

Indeed, in *Doe* v. *Bolton*, 410 U.S. 179 (1973), and *Planned Parenthood of Central Missouri* v. *Danforth*, — U.S. —, 96 S.Ct. 2831 (1976), the Court explicitly tied the right of privacy to the physician-patient relationship. In *Bolton*, for example, the Court found that the committee approval requirement for hospital-performed abortions was constitutionally infirm because it substantially limited "the woman's right to receive medical care in accordance with her licensed physician's right to administer it. . . ." 410 U.S. at 197. Likewise, the Court found that the two-doctor concurrence requirement severely limits the patient's right to privacy and "unduly infringes on the physician's right to practice." *Id.* at 199. And in *Planned Parenthood, supra*, the Court held state requirements

for spousal and parental consent for abortion unconstitutional on the ground that "when the physician and his patient make that decision, the State cannot delegate authority to any particular person . . . to prevent abortion . . . ." 96 S.Ct. at 2841.

Both the California Supreme Court and the Court of Appeals below agreed that the patient's interest in keeping secret the confidential communications between himself and his psychiatrist during psychotherapy falls squarely within the zone of privacy protected by this Court's previous decisions. In *Lifschutz,* for example, the California Supreme Court unanimously stated:

> "We believe that a patient's interest in keeping such confidential revelations [as are disclosed in psychotherapy] from public purview, in retaining this substantial privacy, has deeper roots than the California statute and draws sustenance from our constitutional heritage. In *Griswold* v. *Connecticut, supra,* 381 U.S. 479, 484, the United States Supreme Court declared that 'Various guarantees [of the Bill of Rights] create zones of privacy,' and we believe that the confidentiality of the psychotherapeutic session falls within one such zone. (Cf. *People* v. *Belous* (1969) 71 Cal.2d 954, 963.) Although *Griswold* itself involved only the marital relationship, the open-ended quality of that decision's rationale evidences its far-reaching dimension." 467 P.2d at 567.

The majority below agreed with the California court's analysis, stating, "We have no doubt that the right of privacy relied on by Dr. Caesar is substantial." (Slip. Op. at 8.) Likewise, the dissenting judge explicitly found that confidential psychotherapeutic communications "have the indicia to place those communications

squarely within the constitutional right of privacy." (Dissent, Slip Op. at 3.)

Under this Court's decisions, the sensitive zone of personal privacy is protected as a "fundamental" constitutional right. *E.g., Planned Parenthood of Central Missouri* v. *Danforth, supra; Roe* v. *Wade, supra,* 410 U.S. at 156 (and cases cited therein), 163, 164. See also *Friendship Medical Ctr. Ltd.* v. *Chicago Board of Health,* 505 F.2d 1141 (7th Cir. 1974); *Word* v. *Poelker,* 495 F.2d 1349 (8th Cir. 1974); *Roe* v. *Ingraham,* 403 F. Supp. 931 (S.D.N.Y. 1975), *prob. juris. noted sub nom., Roe* v. *Whalen,* — U.S. — (1976) [44 U.S. L.W. 3471]; *cf. Runyan* v *McCrary,* — U.S.— (1976) [44 U.S.L.W. 5034]; *Yoder* v. *Wisconsin,* 406 U.S. 205 (1973). Thus, as the Court said in *Roe* v. *Wade, supra,* the appropriate test is not a simple balancing of the individual's right against the state's interest in regulation. Rather,

> "regulation limiting these rights may be justified only by a 'compelling state interest,' [citations omitted] and . . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." 410 U.S. at 156.

Amicus submits that, upon analysis, the breadth of the intrusion on psychotherapist-patient confidentiality resulting from application of Section 1016 is unjustified by any compelling state interest, and that the statute, even as construed by the California courts, is not sufficiently narrowly drawn to express only those compelling interests, if any, that may be involved.

B. The Intrusion of California Evidence Code Section 1016 Upon the Constitutionally-Protected Right of Privacy Is Not Justified by Any Compelling State Interest.

1. Section 1016 Strikes an Inappropriate Balance Between the Patient's Right to Privacy and the State's Interest in Production of Relevant Evidence in Private Litigation.

Section 1016 incorporates a state-imposed involuntary waiver of the confidential relationship between a patient and his psychotherapist. The majority of the Court of Appeals held, without further explanation, that the state's "compelling interest to insure that truth is ascertained in legal proceedings in its courts of law" adequately supported this enforced violation of confidentiality. (Slip. Op. at 11.) The dissenting judge, however, concluded that even if this state interest weighed entirely on the side of the party adverse to the patient-litigant, "the patient's interest in his privacy would easily prevail over the state's general interest in the production of relevant evidence in a routine personal injury case." (Dissent, Slip Op. at 5-6.)

At the outset it should be noted that California has not recognized the importance of this supposedly "compelling" interest in many other areas. Rather, this "compelling" interest has frequently been overridden by stronger competing interests in privacy, privilege and nondisclosure. See, *e.g.,* Evidence Code §§ 950-962 (lawyer-client privilege); Evidence Code §§ 970-73 (spousal privilege); Evidence Code §§ 980-87 (confidential marital communications); Evidence Code §§ 1030-34 (clergyman-penitent privilege); Evidence Code §§ 1040-42 (official information and identity of informer); Evidence Code § 1050 (privilege of the

ballot); Evidence Code § 1060 (trade secrets); Evidence Code § 1070 (newsmen's privilege). Thus, for example, similar confidences between a priest and penitent about the penitent's private thoughts are not required to be divulged in the interests of a just disposition of litigation.

Furthermore, as Judge Hufstedler observed below, the balancing of competing interests is in reality not as simple as that suggested by the majority:

> "The public and private interests that are involved are more complex. The state is interested in effective access to the courts and in fair trials with respect to both plaintiffs and defendants in civil litigation. On the patient-plaintiff's side, the state also has interests in the deterrent effect of civil litigation upon potential tort-feasors, in the health of its citizens, and in the protection of privacy of its citizens. [Footnote omitted.] The economic interests of the plaintiff and defendant are also at stake." (Dissent, Slip Op. at 6.)

When these additional considerations are taken into account, *amicus* submits that the simple interest in getting *all* relevant evidence into a private litigation, regardless of the cost to a litigant's right to privacy, is not sufficiently compelling to justify the destruction of confidentiality envisioned by the California statute.

2. Section 1016 Fails to Reflect the Distinction Between the Treating Psychiatrist (in His Role as Healer) and the Diagnostic Psychiatrist.

Recognition of the state's interest in providing relevant evidence in private litigation does not require full disclosure of all related communications between

a patient-litigant and the psychotherapist(s) who have treated or are treating the patient. Such an approach fails to recognize the important distinction between the roles that the treating and diagnostic psychiatrists play in the patient's life.

The diagnostician is one who is called upon to examine a patient and determine his mental condition and its possible root causes. It is unnecessary for the diagnostician to determine whether treatment is indicated or, if so, what treatment would be preferable; most significantly, the diagnostician does not undertake to provide such treatment. Hence, he does not and need not establish and maintain an intimate relationship of trust and privacy with his patient. Nor is the patient led to expect that such a relationship will be inherent in his communications with the diagnostician to the same extent as with a treating therapist. The *treating* psychotherapist, by contrast, must enter into a trust relationship with his patient to accomplish the *healing* function—a relationship in which continuing confidentiality is essential.

The distinction between these roles is aptly illustrated by this case. Dr. Caesar refused to answer only those questions that he believed would be destructive of his role as *healer*. In addition, Ms. Seebach's attorney caused her to consult with an eminent diagnostician respecting the issue raised by her lawsuits, and tendered the diagnosis of that psychiatrist for the purposes of the litigation. Ms. Seebach also made herself available for diagnosis by a psychiatrist of the defense's choosing.

In short, as in this case, the need for disclosure of relevant information can easily be reconciled with the

patient's right of privacy by permitting or requiring testimony of diagnosing psychiatrists (an approach implicit in the holding proposed by the dissenting judge below), while protecting from disclosure communications between the litigant and therapists who have *treated* him. Given this access to alternate sources of relevant psychiatric data, the state's interest in full disclosure of all communications a patient-litigant has ever had with any treating therapist assumes a far less compelling position. Viewed from this more discriminating perspective, the opinion of the Court of Appeals cannot withstand constitutional scrutiny.

3. Invalidation of Section 1016 Will Not Unfairly Disadvantage Private Litigants Who Are Adverse to Patient-Litigants.

At bottom, the reasoning of the California Supreme Court in upholding Section 1016 in *Lifschutz, supra,* upon which the majority below relied *in toto*, seems to have been premised on a notion that it is "unfair to permit a patient-litigant to establish a claim while simultaneously foreclosing inquiry into relevant matters." 467 P.2d at 569. In light of the facts of the instant case and the availability of information from diagnostic psychiatrists, however, this analysis of "fairness" is far too simplistic.

Protection of confidentiality between the patient-litigant and treating therapists does not mean, as this case indicates, that the patient can "establish a claim" by testifying about her mental injuries while simultaneously foreclosing the defense from access to the only source of expert knowledge about that claim. Nor does enforcement of the patient's interest in privacy mean that patient's treating therapist may offer evidence in support of the patient as to his diagnosis, and remain insulated from cross-examination. On the contrary, when the patient raises an issue regarding his psychological or emotional state, the defense may be given the right to have a doctor of its own choosing examine the plaintiff. And, of course, the defense has the same right to examine any diagnosticians consulted by the plaintiff as do the plaintiff's own attorneys. Thus plaintiff and defendant are in reality afforded the same access in litigation to sources of information about the plaintiff's condition. This is all that fairness demands.[2] And, in view of the importance of the confidential relationship between the patient and his psychiatrist, this is all that the constitution allows.

The California court in *Lifschutz* also expressed the view that when a patient raises a specific ailment in litigation, he "in effect dispenses with the confidentiality of that aliment and may no longer justifiably seek protection from the humiliation of exposure." 467 P.2d at 569. Not only is this an inaccurate statement of the problem, it is inherently *unfair* to the patient-litigant.

In the first place, while the patient, by instituting litigation, does publicize the fact of an ailment, he does

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[2] By analogy, it should be noted that it is not generally regarded as "unfair" that civil discovery rules provide only for discovery of facts known and opinions held by persons whom an adverse party "*expects to call as expert witnesses at trial.*" These rules do not, however, generally permit discovery from experts specially retained in anticipation of litigation or for trial preparation. Moore, *Federal Practice* ¶ 26.66[3] and [4] (emphasis supplied).

not thereby make public all confidential communications involved in the treatment of that ailment. More important, the conditioning of access to the judicial process upon destruction of a psychotherapeutic patient's most private reservoir of personal secrets is based on a faulty constitutional premise. The patient is entitled to legal redress for injury just as any other claimant. The state cannot condition access to its judicial system—the sole means of enforcing the patient's right to compensation for his injuries—on surrender of a constitutional right. See, *e.g.*, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Griffin* v. *Illinois*, 351 U.S. 12 (1956). As this Court recently said in another context involving invasion of personal privacy:

> "[By going to court to obtain a divorce] respondent [did not] freely choose to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony. We have said that in such an instance ' [r]esort to the judicial process . . . is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.' " *Time, Inc.* v. *Firestone*, ... U.S. ...., 96 S. Ct. 958, 965 (1976).

Accordingly, the state's interest in guaranteeing fairness in private civil litigation is just as fully protected as its interest in permitting full access to relevant evidence for all parties by limiting disclosure of psychiatric confidences to that material which the patient-litigant divulges to a *diagnostic* psychiatrist.

C. California Evidence Code Section 1016, Even as Construed, Is Not Narrowly Drawn.

1. THE CONSTRUCTION PLACED ON SECTION 1016 BY THE CALIFORNIA SUPREME COURT TO LIMIT ITS INTRUSION ON THE PATIENT'S PROTECTED RIGHT OF PRIVACY AND THUS TO SAVE THE STATUTE'S CONSTITUTIONALITY IS UNWORKABLE IN PRACTICE AND HAS NOT ACHIEVED ITS PURPOSE.

In *Lifschutz*, the California Supreme Court recognized that Section 1016, if literally construed, would result in "an intolerable and overbroad intrusion into the patient's privacy, not sufficiently limited to the legitimate state interest embodied in the provision and would create opportunities for harrassment and blackmail." 467 P.2d at 570. Accordingly, that court struggled to find a limiting construction of the statute that would eliminate these constitutional infirmities:

> "Under section 1016 disclosure can be compelled only with respect to *those medical conditions* the patient-litigant has 'disclosed . . . by bringing an action in which *they* are in issue' [citation omitted]; communications which are not directly relevant to those specific conditions do not fall within the terms of section 1016's exception and therefore remain privileged. Disclosure cannot be compelled with respect to other aspects of the patient-litigant's personality even though they may, in some other sense, be 'relevant' to the substantive issues of the litigation." *Id.* at 570 (emphasis in original).

For the reasons set out above, however, a reasoned analysis of the state's actual interest in production of relevant evidence in personal injury litigation demonstrates that an even narrower construction of the

statute would suffice to protect that interest—a construction protecting the privacy of treatment but not of diagnosis—so long as adverse litigants had access to adequate diagnostic data to contest the patient-litigant's claim.

The need for such a limiting construction is made more apparent by the fact that the California courts' approach has proven unworkable and impossible to apply in a manner protective of the right of privacy. In the instant case, Ms. Seebach sought voluntarily to limit her claim to those conditions determined to exist by the diagnostic psychiatrist she consulted for the purpose of litigation. Nevertheless, the trial court in effect ordered full disclosure of the communications she had with Dr. Caesar concerning her condition and the causes and treatment of it. As the trial court itself acknowledged:

> "You have to deal with the individual as a whole person . . . you can't compartmentalize her . . . to the extent that she is seeking compensation for the deterioration of her condition attributable to some conduct on the part of someone else, you have to explore all the factors that might have led to that deterioration."

The fact is that there is no effective way to separate out the mental problems allegedly caused by the conduct of a defendant from the complete range of factors that make up the patient-litigant's entire personality and experience.

The futility of the *Lifschutz* test was explicitly cited by the dissenting judge below as sufficient reason to justify imposition of a narrower interpretation of

Section 1016 in order to prevent an unconstitutional result:

> "The problem is that this formulation is almost impossible to apply, and, to the extent that it can be sufficiently refined to be able to apply it, the relevance test impermissibly encroaches on the patient's zone of protected privacy." (Dissent, Slip Op. at 7.)

In addition, under *Lifschutz* the burden is placed *on the patient* to show that a given confidential communication "is not directly related to the issue he has tendered to the court." 467 P.2d at 571. As Judge Hufstedler, dissenting below, pointed out:

> "The laymen-patient simply cannot be expected to diagnose his own illness, to determine for himself what mental conditions are in issue in the lawsuit, or to decide what evidence is or is not 'directly' related to the issue. Even a medically trained patient turned personal injury lawyer would be hard pressed in territory less slippery than mental health to prove the negative *Lifschutz* imposes upon him." (Dissent, Slip Op. at 7.)

Accordingly, Judge Hufstedler suggested that Section 1016 be construed to permit compulsion only of the psychotherapist's "ultimate diagnosis," *unless* the party seeking disclosure made a showing of "compelling need" for production of the information sought. In effect, this proposed test springs from the same conceptual roots as that proposed by *amicus* herein.

CONCLUSION

For the reasons set out above, *amicus* submits that this Court should grant the writ of certiorari in this case to determine whether California Evidence Code

Section 1016, as construed, still intrudes unjustifiably on the constitutionally-protected right of privacy inherent in the process of psychotherapeutic treatment.

Amicus further submits that the interest in privacy can be protected, and that the state's interest in production of evidence in civil litigation adequately vindicated, by a holding requiring that only confidential communications made during a diagnostic psychiatric examination—and not communications made in the course of treatment—may constitutionally be compelled under Section 1016.

Respectfully submited,

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